IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondent, Richard T. Ford, respectfully seeks leave to proceed here in forma pauperis, and to file a typewritten brief in opposition to the petition for certiorari. Counsel's affidavit in support of this application is annexed.

David J. Gottlieb

PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
RICHARD T. FORD
THE LEGAL AID SOCIETY (APPEALS)
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,

Of Counsel.

New York, New York
September 2, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID J. GOTTLIEB, being duly sworn, deposes and says:

I am an attorney associated with The Legal Aid Society, Federal Defender Services Unit. I am the attorney who prepared the brief and argued the appeal on behalf of respondent Richard T. Ford before the United States Court of Appeals for the Second Circuit.

On appeal, respondent Ford was represented by counsel from The Legal Aid Society, Federal Defender Services Unit, assigned by the Court of Appeals for the Second Circuit pursuant to the Criminal Justice Act.

On August 12, 1977, respondent Ford was released on recognizance in connection with his sentence in this case pending the resolution of his case before this Court. The next day he was released on parole from the Massachusetts State Correctional Institution in which he was serving his federal and state sentences. While Mr. Ford is presently employed, it is at the same job he held while in a work-release program, and his parole release requires him to pay for numerous living expenses which he was not required to pay for while incarcerated. Thus, I am aware of no favorable changes in his circumstances which would suggest he is now more capable of retaining counsel to represent him in this proceeding than in the Court of Appeals, and I believe he is without sufficient funds to retain counsel or to pay the costs connected with this petition.

WHEREFORE, it is respectfully prayed that respondent Richard T. Ford be permitted to proceed here in forma pauperis, and file a typewritten brief in opposition to the petition for certiorari.

David J. Gottlieb

DAVID J. GOTTLIEB

Sworn to before me this
day of September 1977.

Notary Public

JONATHAN J. SILBERMANN
NOTARY PUBLIC, State of New York
[illegible]
Qualified in [illegible] County
Commission Expires [illegible] 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

INDEX

TABLE OF CASES

Cases

Statutes

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit included as Appendix A to the petitioner's appendix is reported at 550 F.2d 732.

QUESTIONS PRESENTED

1. Whether there is any conflict in the circuits or uncertainty on the issue presented by this case.

2. Whether, when the federal government lodges a detainer against a state prisoner, the subsequent production of that

prisoner for temporary federal custody for trial in federal court by a means of a writ of habeas corpus ad prosequendum invokes Article IV of the Interstate Agreement on Detainers.

3. Whether this Court should review the conclusion of the court below that, on the facts of the case, respondent did not waive his claim under Article IV of the Interstate Agreement on Detainers.

STATEMENT OF THE CASE

After lodging a detainer against respondent in Massachusetts, where he was then incarcerated, the Government produced respondent for trial in the Southern District of New York via a writ of habeas corpus ad prosequendum in March, 1974. Despite his frequent requests for a prompt trial, he was not tried until September, 1975, some 17 months later, with the detainer outstanding against him the entire time. The Interstate Agreement on Detainers having been invoked by the Government's filing of a detainer and subsequent obtaining of custody of respondent, and because the requirement of Article IV(c) of the Agreement that trial be held in 120 days was violated, the Court below reversed the judgment of conviction.

On October 11, 1973, respondent Richard T. Ford was arrested in Chicago, Illinois, by the FBI on warrants charging him with bank robbery and interstate flight to avoid prosecution. The interstate flight warrant was dismissed but respondent was held by Chicago authorities for extradition to Massachusetts to face pending state charges (PA 2a; 550 F.2d at 735).* While incarcerated in Chicago respondent submitted a letter to the United States Attorney for the Southern District of New York and to the United States District Court for the Southern District of New York

*Numerals and letters preceded by "PA" are references to pages of petitioner's appendix. References to "RA" refer to Respondent Ford's appendix in the Court of Appeals.

requesting a prompt trial on the federal charges (See PA 22a, 550 F.2d at 742; RA "D"). Before receiving a response, respondent was extradited to Massachusetts to stand trial on the state charge, and the federal warrant issued by the Southern District of New York charging him with bank robbery was lodged as a detainer. On February 8, 1974, respondent pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of eight to ten years' imprisonment (PA 2a-3a, 550 F.2d at 735).

On March 21, 1974, a two-count indictment charging respondent with bank robbery was filed in the Southern District and on March 24, a writ of habeas corpus ad prosequendum was issued to obtain custody of respondent for arraignment and until he was "discharged or convicted and sentenced on said indictment." (RA "B", "H"). On April 1, 1974, appellant was arraigned, and that same day the Government filed a notice of readiness. Two days later, the present superceding indictment was filed, charging respondent and one James T. Flynn with bank robbery and other crimes. On April 11, 1974, respondent pleaded not guilty to the indictment and a warrant was issued against Flynn who failed to appear. A trial date was set for May 28, 1974 (PA 3a, 550 F.2d at 735). The Government requested that the trial not begin until that date, inter alia, in order to give it the opportunity to locate co-defendant Flynn (Transcript of April 25, 1974, at 16-18).

On May 17, 1974, shortly before the scheduled trial date, the Government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until the co-defendant was apprehended, whichever came first, and supporting its request by a sealed affidavit. Noting respondent's previous request for a speedy trial, the defense objected to the delay and informed the Court that the federal detainer lodged against respondent in Massachusetts was impairing his eligibility for furlough and work release programs.

Nevertheless, the Government's motion was granted, and a trial date was set for August 21, 1974. Following the granting of the motion, respondent was removed from federal custody and transferred back to Massachusetts (PA 3A, 550 F.2d at 735; Transcript of May 22, 1974).

In August, 1974, the case was reassigned to a different district judge, the original judge having resigned from the bench. Without informing the defense in advance of its decision or permitting it to be present, the Court, without explanation, postponed the trial date until November 18. On November 1, the Government yet again moved for a 90-day adjournment within which to apprehend respondent's co-defendant, and again supported its motion by sealed affidavit. The defense objected to the request and further moved to dismiss the indictment on the ground that respondent had been denied a speedy trial, again alleging that he was being prejudiced, inter alia, by denial of rehabilitative privileges due to the federal detainer (RA "D"). The Court denied the defense motion and granted the Government's request for an adjournment.

On the scheduled trial date, the district judge was engaged in a stock fraud trial. Although the Second Circuit had recently emphasized that calendar delay was no excuse for postponing a criminal trial and that in such cases the action should be assigned to a different judge (United States v. Drummond, 511 F.2d 1049, 1053 (2d Cir.), cert. denied, 423 U.S. 844 (1975)), the district judge instead again postponed the trial over defense objection, until June 11, 1975. In the following month, the Southern District announced a crash program for civil cases. When the Assistant United States Attorney inquired whether this would affect the date of respondent's trial, the district judge sua sponte set a new trial date, and only subsequently notified the defense which again futilely protested the delay (PA 4a, 550 F.2d at 735-736; RA "E").

On August 8, 1975, the Government obtained respondent for trial by means of a second writ of habeas corpus ad prosequendum (RA "I"). The trial began on September 2, 1975. On that day, respondent again moved for dismissal for failure to provide a speedy trial. The motion was denied, and respondent was subsequently convicted of all counts. The district judge sentenced respondent to concurrent five year terms, with the recommendation that the terms be allowed to run concurrently with the Massachusetts state sentence respondent was already serving* (PA 4a-5a, 550 F.2d at 736).

On appeal to the Second Circuit, respondent argued that the delay in bringing him to trial violated the Southern District Plan for prompt disposition of criminal cases, the Sixth Amendment, and Articles IV(c) and IV(e) (the speedy trial and transfer provisions) of the Interstate Agreement on Detainers. On February 3, 1977, the Court of Appeals reversed. Without reaching respondent's Sixth Amendment or Speedy Trial rule claims, the Court of Appeals found a failure to comply with Article IV(c) of the Interstate Agreement on Detainers, which mandates that trial be commenced within 120 days of receipt of the prisoner unless continuances are granted for good cause in open court, and accordingly ordered dismissal of the indictment.

After a review of the history and purposes underlying the enactment of the Interstate Agreement on Detainers, aptly characterized by the dissenting judge as a "most learned and exhaustive treatise" (PA 26a, 550 F.2d at 744), the Court concluded that where the federal government has actually filed a detainer against a state prisoner, it invokes Article IV of the Interstate Agreement on Detainers by production of the prisoner for

---

*On August 13, 1977, respondent was released on parole on his state sentence. The preceeding day, he was released from federal custody on his own recognizance pending the disposition of this case after having served some 20 months of the sentence concurrently with the Massachusetts sentence.

trial by means of a writ of habeas corpus ad prosequendum. The Court noted that to hold otherwise would vitiate operation of the Agreement "insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would impair the operation of the agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (PA 20a, 550 F.2d at 742). In reaching this narrow conclusion Judge Mansfield carefully distinguished this case from the circuit's then recent opinion of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. pending, Sup.Ct. Doc. No. 76-1596, which held the sanctions of the agreement applicable where no detainer was filed but where "the sole federal intervention is the issuance of a habeas writ" (PA 19a, 550 F.2d at 741).

After concluding that the agreement applied, the Court first rejected respondent Ford's claim that his transfer back to Massachusetts prior to trial violated Article IV(e) of the agreement, which mandates that a defendant be tried before being returned to his original jurisdiction, holding that respondent had requested to be returned to Massachusetts and that such request waived his claim under Article IV(e). Turning to Article IV(c) which requires that trial be held within 120 days, except for reasonable continuances granted in open court, the panel found that respondent had not waived this claim, and that on the contrary, he had from the outset repeatedly insisted upon a prompt trial. The majority then determined that a number of the continuances were unjustifiable, in addition to having been decided upon outside of the respondent's presence (PA 21a-26a, 550 F.2d at 742-744). Accordingly, the Court ordered dismissal of the indictment. In dissent, Judge Moore took no issue with the majority's conclusion that the Agreement on Detainers applied but disagreed with the majority's conclusion that the continuances were unnecessary and unreasonable (PA 28a-29a, 550 F.2d at 744-745).

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE. ACCORDINGLY, THERE SHOULD BE NO "UNCERTAINTY" CAUSED BY THE COURT'S OPINION.

In its effort to convince the Court of the importance of this case, the Government attempts to link the narrow holding of the Court below with the Second Circuit's opinion in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. pending, Sup.Ct. Doc. No. 76-1596. This effort is ill-conceived. Mauro involves the question of whether the Government is bound by Article IV of the Interstate Agreement on Detainers when it obtains a prisoner from another jurisdiction by a writ of habeas corpus ad prosequendum where no previous detainer against the prisoner has been filed by the Government, i.e., whether the Government writ in itself constitutes a "detainer" as well as a request for custody. The Mauro conclusion that a habeas writ is a detainer has divided the circuits. Compare United States v. Mauro, supra, and United States v. Sorrell, No. 76-1647 (3rd Cir. August 22, 1977)(en banc) with United States v. Kenaan, ____ F.2d ____, No. 77-1014 (1st Cir. July 7, 1977), petition for cert. pending, Sup.Ct. Doc. No. 77-206; United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977), petition for cert. pending, Sup.Ct. Doc. No. 76-6559; Ridgeway v. United States, ____ F.2d ____, No. 76-2145 (6th Cir. July 13, 1977), petition for cert. pending, Sup.Ct. Doc. No. 77-5252.

In contrast, this case presents a question not only more limited than that in Mauro, but one which has produced no conflict among the circuits: Where the Government has actually filed a detainer, thus burdening the defendant with the very disabilities which were the reasons for enacting the Interstate Agreement on Detainers, and the Government thereafter obtains

custody of the defendant, may it nevertheless avoid the Agreement because its custody request is denoted a writ of habeas corpus ad prosequendum rather than some other name. After an exhaustive opinion, the Court below held that the Agreement applied. The Court's opinion, in accord with the language of the statute and other federal decisions, is hardly as novel as the Government suggests. Indeed, the Government petition in effect concedes that had any state which was a party to the Agreement followed the actions engaged in by the Government, there is no doubt they would have been held bound by the Agreement. More importantly, unlike Mauro, the Ford decision concerns an issue which has engendered no split in authority among the circuits. In fact, the very cases which conflict with Mauro affirm the validity of the Ford opinion. Thus, in United States v. Kenaan, supra, while the First Circuit rejected the view that a writ of habeas corpus constituted a detainer under the agreement, it explicitly, albeit in dicta, approved of the result in Ford:

> "Were we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and receiving state and that when it lodges a detainer, as it did in Cyphers, Ford and Sorrell...the United States must comply with the agreement."
>
> Slip op. at 5 n.6.

To similar effect, the Fifth Circuit in United States v. Scallion, supra, distinguished the case before it, where no detainer was lodged, with the case where the Government actually lodges a detainer:

> The Government also argues that when Congress enacted the Act it intended to cast the United States in the role of a "Sending State" and not a "Receiving State" under the Agreement in recognition of the existing power to obtain custody of state prisoners by the use of the writ of habeas corpus ad prosequendum. We are unable to detect such intent. Article II provides that "State" as used in the Agreement includes the United States of America. To the extent that the United States makes use of a detainer, it is a "Receiving State" subject to the terms of the Agreement.
>
> 548 F.2d at 1174 (emphasis supplied).

Accord, United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977), petition for cert. pending, sub. nom United States v. Ferro, No. 77-326; United States v. Sorrell, supra. See also, United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974)(court "assume[s]", without deciding question, that habeas writ is a request under Article IV but rejects defendant's challenge that Agreement applies when custody obtained "before any detainer was filed").

In light of the complete lack of dispute among the federal courts considering the issue, there is simply no reason for federal prosecutors to be left "profoundly uncertain" about whether when the Government actually files a detainer, and subsequently obtains a state prisoner for trial by a writ of habeas corpus, it is subject to Article IV of the Interstate Agreement on Detainers. A number of circuits have spoken on the issue, all adhere to the result in Ford. There is no split, or hint of one, in the circuits. While the Justice Department may disapprove the result reached, there is no uncertainty about the language as enacted by Congress or the application of the statute by the courts.

II

THE DECISION OF THE COURT BELOW WAS ENTIRELY CORRECT.

The essence of the Government's principal position is that the Agreement was enacted by Congress primarily to give the states a practical method of obtaining federal prisoner, thus helping to assure that the states would comply with the speedy trial requirements of Smith v. Hooey, 393 U.S. 374 (1969). The Government insists that there is no benefit to federal prosecutors

and that in light of this lack of benefit, as well as subsequent legislation, and the language of several provisions of Article IV, there is "severe doubt that Congress intended to subject federal prosecutions maintained with the aid of writs of habeas corpus ad prosequendum to the terms of the Agreement." As the exhaustive and learned opinion of the Court below demonstrates, petitioner's attempt to disengage itself from the Agreement misreads the history of the Interstate Agreement on Detainers and ignores the plain language of the Agreement.

A.

Contrary to the Government's view, the Interstate Agreement on Detainers as a whole, and Article IV in particular, was not designed for the sole purpose of aiding state officials to provide speedy trials. Rather, it was designed to remedy a multiplicity of problems present in both state and federal jurisdictions caused by the extensive but unregulated use of detainers. Under the system prior to adoption of the Act, once a jurisdiction had convicted an accused, another jurisdiction, rather than trying him for charges pending there, would merely file a detainer at the place of custody in the first jurisdiction notifying the prison authorities of the pending charges. The disadvantages of the unregulated system were felt by prison administrators, prosecutors, and defendants alike. The existence of detainers adversely affected the terms and conditions of a prisoner's confinement often rending him ineligible for furloughs, minimum custody, or even parole, without any recourse on the prisoner's part to change them. The pendancy of a detainer hampered prison administrators, state and federal, in developing coherent rehabilitation programs and created difficulties for federal and state judges in sentencing. These uncertanties in turn affected the prisoner's ability to rehabilitate himself, A host of different problems were encountered by the inmate when he eventually had to

prepare for trial, often far from witnesses or evidence. Finally, extradition rules were confusing and cumbersome at best (See PA 9a-17a, 550 P.2d at 737-740).

It was to remedy all these problems that the Interstate Agreement on Detainers was written and it was with recognition by Congress of the fact that these problems were affecting the federal as well as state governments that the Congress voted to make the United States a party to the Agreement. See S. Rep. No. 91-1356, 3 U.S. Code Cong. and Admin. News at 4865-4867 (1970); 116 Cong. Rec. 13999 (Remarks of Congressman Kastenmeier).

The Agreement provides a comprehensive scheme for disposing of detainers, a scheme which is, by its own terms, fully applicable to the United States, since the United States is defined in Article II of the Agreement as a "state" under the Agreement. Article III of the Agreement provides a procedure whereby the prisoner may demand trial when there is a pending charge "on the basis of which a detainer has been lodged against the prisoner" (Article III(a)). Article IV provides the means by which the prosecutor may, by filing a request for custody, summon for trial a prisoner "against whom he has lodged a detainer and who is serving a term of imprisonment in any party state..." The two principal qualifications for the state making use of the procedure are the requirements that trial be held within 120 days of receipt of custody with allowance for reasonable continuances and that the inmate not be returned to his original jurisdiction until after trial is completed. While one of the purposes of Article IV is to simplify transfers between the various states, contrary to the Government's view it is not the sole purpose. The Article is also designed to insure both prisoners and the states that outstanding detainers will be disposed, and that charges will be expeditiously resolved, a consideration which applies where the federal Government obtains a prisoner, as well as when the state obtains a prisoner. Furthermore, Article IV is

a necessary complement to the provisions of Article III, by which a prisoner may demand trial:

> In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without the Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement.
>
> PA 18a, 550 F.2d at 741.

Thus, the history and purposes of the Agreement provide absolutely no support for the view that the federal government should not be bound by Article IV when it invokes the Agreement by filing a detainer and thereafter obtains custody of the prisoner. However, any doubt on this score is removed by reference to the literal terms of the Agreement, which states that "[t]his agreement shall enter into full force and effect as to a party State when such State has enacted the same into law" (Article VIII), and further provides that "[t]his agreement shall be liberally construed so as to effectuate its purposes" (Article IX).

Obviously, a holding that the Government is not bound by Article IV, even when it files a detainer, only because it denotes its custody request a writ of habeas corpus ad prosequendum rather than something else, would completely frustrate the Agreement as respects federal detainers since most transfers occur pursuant to the writ. Moreover, it would, as the Court below noted, impair operation of the Agreement as an attempt to solve a nation-wide problem since federal detainers form a large percentage of all detainers outstanding (PA 20a-21a, 550 F.2d at 742). There is simply no support for the Government's attempt at a judicial repeal of an integral part of the Agreement on Detainers. It is also notable that the Government provides no reason why this Court should engage in such a drastic procedure. All states who are parties to the Agreement have managed to follow the limited conditions imposed in Article IV without problems. There is absolutely no reason to exempt the federal government.

B.

The Government next points to language in Article IV(a) which, it submits, indicates that the Article as a whole does not apply to the Government when it seeks custody of a prisoner by means of a habeas writ. The particular portion of Article IV(a) upon which the Government focuses is that there be a 30-day waiting period within which the Governor of a state may deny a custody request. The Government claims this language is inconsistent with the terms of a habeas writ, which are mandatory. In the first instance, it is not settled that a habeas writ is mandatory, since "the jurisdiction to which such writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign." United States v. Mauro, supra, 544 F.2d at 592; United States v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975); Comment, 31 U. Chi. L. Rev. 535, 541 (1964). See also, Carbo v. United States, 364 U.S. 611 (1961).

However, even if the writ is mandatory, there is no conflict between the writ and the Agreement. As the Court below noted, the 30-day provision of Article IV(a) was not designed to change existing law, but merely to preserve any existing right to refuse extradition which might have been possessed by officials prior to the Agreement. There should be therefore no real conflict between the Article and the writ if in fact prior to the statute there was no right to refuse the writ.

Thus, any conflict at all between Article IV(a) and the habeas writ is at most a hypothetical conflict in language and there is no reason to fail to apply the Agreement where the Government has proceeded by filing a detainer and where in fact the Governor has complied with the terms of the writ. As the Court below noted:

> Thus, we are asked to take a hypothetical and possibly non-existent conflict between a minor provision of the Act which relates to transfer mechanics and prior federal law and use it as the touchstone for an interpretation which would vitiate its operation as it affects federal detainers...
>
> (PA 20a, 550 F.2d at 742)(citations omitted).

As the Court concluded, to adopt such a position would be to stand the Agreement on its head.

C.

Even further afield is the Government's argument that the enactment of the Speedy Trial Act four years after Congress joined the Agreement on Detainers indicates a lack of intent on Congress' part to have subjected the Government to Article IV of the Agreement. The weakness of this claim is admitted at the outset by the Government, which recognizes that the enactments of a later Congress are hardly determinative of the intent of an earlier Congress. Pet. for cert. at 18; cf. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Wise, 370 U.S. 405 (1962). In any event, the provisions of the Speedy Trial Act not only do not conflict with the Agreement, but read with the Agreement form a complimentary unit.

Thus, because the Agreement applies only where the Government files a "detainer," it was incomplete because it did not require a party state which did not file a detainer to notify the prisoner of outstanding charges. See Note, 77 Yale L.J. 767, 775 (1968). What Congress did in part of the Speedy Trial Act (18 U.S.C. §3161(j)(1)) was to close this "loophole" and require the federal government, when it has an outstanding charge, either to procure the prisoner or to notify him of the pending charge by filing a detainer. This notification, in the case of a transfer between party states to the Agreement would then, of course, bring the Agreement into play. Moreover, contrary to the Government's view, the Speedy Trial Act recognizes the existence of compacts such as the Interstate Agreement and specifically disclaims any intent of changing existing law in that regard. Thus, the Legialative Report on the Act states, with reference to another section of the Speedy Trial Act, 18 U.S.C. §3161(j)(4):

> In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, the Committee does not intend in any way to change existing law with respect to extradition or transfer of and responsibility for custody in cases where more than one jurisdiction is involved.
>
> H. Rep. No. 93-1508 93rd Cong. 2d Sess. at 36 (emphasis supplied).

Finally, there is nothing inconsistent about the fact that the time limits or conditions in the Speedy Trial Act may differ from those in the Interstate Agreement on Detainers. Quite simply, the two are different pieces of legislation with different procedures because of the variance in purpose and participants. The time limits in the Interstate Agreement apply to a particular class of cases in a number of jurisdictions which have voluntarily agreed to become parties to the Agreement. If the United States wishes to set different time limits for its criminal cases, it is, of course, free to do so, but that fact hardly constitutes a repeal of the limits contained in the Interstate Agreement which the United States has adopted by becoming a party.

D.

The Government's claim that respondent was not prejudiced by the Government's violation of the Agreement -- the long 17 month delay between the indictment and his trial -- is flatly incorrect. In the district court's final sentence, it was recommended that appellant's sentence be served concurrently with a sentence he was serving in Massachusetts, a sentence imposed before the indictment in this case. Thus, every day's delay in respondent's trial deprived him of an opportunity for a day's concurrent sentence. Respon-

dent will be substantially prejudiced by the delay in the event of reversal of the conviction since, on August 13, 1977, he was released on state parole with much of his federal sentence left to serve. See generally Smith v. Hooey, 393 U.S. 374 (1969).

III

THE COURT SHOULD NOT REVIEW THE CONCLUSION OF THE COURT BELOW THAT, ON THE FACTS OF THIS CASE, APPELLANT DID NOT WAIVE HIS CLAIM UNDER ARTICLE IV(c) OF THE AGREEMENT.

The Government argues that respondent irrevocably waived his speedy trial claim under the Agreement by his failure to denote his speedy trial objection as including a claim under Article IV(c) of the Agreement. We submit that on the particular facts of this case, the Court below correctly found otherwise, and that in any event, the application of waiver principles to a particular claim under the Agreement does not at this point present an important question of federal law meriting Supreme Court review.

It is notable that before determining appellant's claim under Article IV(c) of the Agreement the Court of Appeals concluded that respondent, by his request to be returned to Massachusetts, had waived any claim he might have under Article IV(e). However, the court correctly noted that while respondent, by this action, might have waived his right to a transfer, he did not waive any right to a speedy trial. In fact, respondent, from the time of his arrest had sent a letter to the Assistant United States Attorney requesting a trial as expeditiously as possible. He objected to every continuance that was granted at an in-court proceeding at which he was present and twice moved for dismissal of the indictment. Given respondent's repeated requests for a speedy trial, it is small wonder that the Court failed to find a knowing and intelligent waiver of the speedy trial provision of the Agreement merely by his failure to assert the particular provisions of the Agreement prior to trial.* Indeed, a finding of waiver would have been particularly inappropriate in light of the fact that two of the continuances in this case were ex parte, with the defendant neither present nor afforded the opportunity to object to the Court's actions.

The refusal to find a waiver merely on the basis of failure to assert the claim prior to trial is in accord with the language of the Agreement, and the decided cases on this issue. Thus, unlike provisions such as the Southern District Speedy Trial Rules, the Agreement has no specific requirement that the defendant initiate objection if he is not tried in accord with the time limits set forth in Article IV. Rather, the Agreement commands that in the event the agreement is violated, the Court "shall enter an order" dismissing the indictment with prejudice (Article V(c)). It is mandatory on the happening of the delay and includes no requirement that defense counsel advise the Court and the Government on the law.

As the Second Circuit also recognized in United States v. Cyphers, supra, Rule 12 of the Federal Rules of Criminal Procedure which mandates that certain motions be raised prior to trial or be thereafter waived, is simply inapplicable to claims under the Agreement. 556 F.2d at 634. And, while the Agreement might itself have provided that failure to assert the claim before trial was a waiver of the claim, the Agreement does not so provide.

The still-evolving interpretation employed by the Second

---

*That such questions of waiver turn upon the facts of each individual case is illustrated by the circuit's ensuing decision of United States v. Cyphers, supra. In Cyphers, the Court specifically rejected the Government's argument that the failure to raise the detainer claim before trial per se constituted a waiver under Rule 12(f) of the Federal Rules of Criminal Procedure. Noting that in Cyphers there was no evidence that the defendant even knew that a detainer had been lodged against him, the Court held that the defendant might invoke the Agreement for the first time on appeal.

and other Circuits and exemplified by the instant case is not in necessary conflict with the Fifth Circuit's decision in United States v. Scallion, 548 F.2d 1158 (5th Cir. 1977). Thus, in Scallion, while the Court found a waiver of the defendant's detainer claim, the waiver occurred in circumstances where the claim under the Agreement had not only not been raised at trial, but had not been raised on appeal, or for that matter on rehearing, but on an untimely "amended petition for rehearing" filed after initial denial of the rehearing claim. In such circumstances, it is no great surprise that the panel found that "[t]o consider Scallion's unconstitutional claim at this late stage would tend to encourage piecemeal litigation of claims of error in the appellate courts and undercut the policy of achieving prompt and final judgments." 548 F.2d at 1174.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
RICHARD T. FORD
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,

Of Counsel.